LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 24 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 1044

HAROLD WAPNICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT S. SIEGAL,
Attorney for Petitioner.

INDEX

	PAGE
The Opinion Below	1
The Grounds of Jurisdiction	1
Questions Presented for Review	2
Constitutional Provisions	3
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	5
APPENDIX:	
Opinion of The United States Court of Appeals for the Second Circuit	13

Cases Cited

Cosgrove v. U. S. A., 224 F. 2d 146	6
Davidson v. U. S., 61 F. 2d 250	8
Evans v. U. S., 240 Fed. (2) 695	10
Fowler v. U. S., 273 F. 15	8
Gable v. U. S., 84 F. 2d 929	8
Linde v. U. S., 13 F. 2d 59	8
People v. Grezeszak, 77 Misc. 202	6
Sealfon v. U. S. A., 332 U. S. 575	6
Seefeldt v. U. S., 183 Fed. (2) 713	10
Spalitto v. United States, 39 F. 2d 782	10
U. S. v. Crimmins, 123 F. 2d 271	8, 9
United States v. Leggett, 269 F. 2d 1959, 7th Cir.	10
U. S. v. Oppenheimer, 252 U. S. 85	7

Statutes Cited

Title 18, U. S. C., Sec. 2	3
Title 18, U. S. C., Sec. 371	1, 3
Title 28, U. S. C., Sec. 1254(1)	1
Title 18, U. S. C., Sec. 2312	1, 3, 19

Supreme Court of the United States

October Term, 1962

No.

HAROLD WAPNICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed the conviction of petitioner and others of violation of 18 U. S. C., Sec. 2312, and conspiracy to violate that Sec., 18 U. S. C., Sec. 371 for which petitioner was sentenced to two three year sentences to run consecutively.

The Opinion Below

The Court of Appeals opinion is not reported but is annexed hereto as an appendix.

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on March 27, 1963.

(ii) Jurisdiction of this Court is invoked under 28 U. S. C. S. 1254(1).

Questions Presented for Review

1. May a defendant who has been acquitted in the State Court be tried in the Federal Court for a crime involving the same issues of fact.

2. May a defendant who has been acquitted by a Jury of participation in a conspiracy be tried again on the same issue as to whether or not he was a party to the same conspiracy.

3. How many times must a defendant face a Jury on the same issue of whether or not he was a member of a conspiracy.

4. Does not a determination by one Jury of an issue or a fact determine forever that issue or fact.

5. May a defendant be convicted of the crime of conspiracy to violate the Federal Laws on proof only of a conspiracy to violate the laws of the State of New York.

6. May a defendant be convicted of the crime of conspiracy to violate the Federal Laws where there is no proof of an agreement to violate the Federal Laws or no proof of facts from which an inference could be taken of a conspiracy to violate the Federal Laws.

7. May a defendant be convicted of the crime of transporting or causing to be transported in interstate commerce, motor vehicles knowing the same to have been stolen, without proof that the defendant transported or caused to be transported or aided and abetted the same, in interstate commerce.

8. May a defendant be convicted of the crime of transporting or causing the transportation in interstate commerce of motor vehicles, when the same were sold in the State of New York to reputable dealers in the State of New York who did not know at time of their purchases to

whom they would in turn resell or where the motor vehicles would eventully go to.

9. Did the Court err in instructing the Jury that with respect to the substantive counts of transportation that it was not necessary for the Jury to find that the defendants had actual knowledge of interstate transportation.

Constitutional Provisions

Constitution of the United States: Fifth Amendment "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb* * *".

Statutes Involved

Title 18, U. S. C., Sec. 371:

> "If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each should be fined not more than $10,000.00, or imprisoned not more than five years, or both".

Title 18, U. S. C., Sec. 2312:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

Title 18, U. S. C., Sec. 2:

> "Principals:
>
> A. Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

B. Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such".

Statement of the Case

The defendant Wapnick, a Certified Public Accountant of New York, age 35, married and never before convicted of a crime, was engaged in the business of financing hundreds of Auto Repair Shops throughout New York City. That he advanced monies for repairs and parts, and on certain occasions supplied parts himself. Every dollar he advanced and every dollar he received was by check and deposited in his own account.

The alleged conspiracy contained in the indictment before the Federal Court allegedly stems from an alleged agreement between Harold Wapnick, Phillippe Roy, and Jose Monteiro to commit the crimes alleged in the Federal Indictment and the Bronx Indictment and that the so-called conspiracy referred to in the Federal Indictment is the same alleged common plan or scheme that was tried before the County Court of Bronx County.

The principal witness against Wapnick was one Roy who testified that Wapnick was his partner in a conspiracy to buy wrecks, and steal cars and substitute the numbers from the wrecks on to the stolen cars.

The testimony showed that Wapnick advanced thousands of dollars to Roy for purchase of wrecks, parts and repairs and that he received the same rate of commission approximately $100, per car, as he was getting when advancing similar sums of monies for repairs in legitimate cars.

The testimony showed that Roy received about 90% of the monies in the deal.

The testimony showed that Wapnick advanced these sums of monies for purchases of wrecks which Wapnick

undertook was to be repaired and then sold. The testimony showed that Wapnick paid for parts to be put on cars and for repairs which Roy charged for but never made.

It would be against logic that a person would advance thousands of dollars in an illegal venture to earn the same rate of commission that he earned for years in the same business in a legal venture.

The documentary proof introduced by the petitioner such as books of account, checks and assignments were not disputed.

It is further noted at this time that Roy testified that Wapnick had knowledge that these cars were stolen and were not to be repaired, yet we find that at Roy's request Wapnick paid by check $250 to purchase a front to be placed on a wreck bought with Wapnick's money.

Wapnick, at request of Steinbrecher executed a written guarantee as to all cars theretofore and thereafter sold.

This is clearly another instance which clearly shows that Wapnick had no knowledge that the wrecks were not being repaired.

The issue was simply whether or not Wapnick had knowledge that Roy was stealing cars and substituting them for the wrecks and therefore a participant in the illegal conspiracy.

All of this testimony was submitted to the jury in the Bronx Supreme Court, and the petitioner was acquitted. Thereafter the same testimony in substance was submitted to the jury in the Federal Court, and the jury convicted.

Reasons for Granting the Writ

1. It is petitioner's contention before this Honorable Court that petitioner's constitutional guarantee against Double Jeopardy was violated in that the offense charged

in the indictment was in fact, even though not in name, the same for which the appellant was previously acquitted in *People* v. *Wapnick, et al.*, in the Bronx County Court; and that certainly collateral estoppel operates to preclude the submission of an issue which has already been determined in a Court of competent jurisdiction, in this case, the issue being Wapnick's connection with this conspiracy.

The factual issue before the Bronx County Court, and the factual issue presented before the Federal Court are one and the same, namely; whether or not Wapnick had any knowledge that any of the cars in question were stolen cars; and the Bronx County Court Jury by its verdict replied in the negative.

It is respectfully contended by the petitioner that a finding that there was no participation in a conspiracy is binding in a later prosecution for aiding and abetting in the commission of the substantive crime which was the sole object of the conspiracy; *Sealfon* v. *U. S. A.*, 332 U. S. 575; *Cosgrove* v. *U. S. A.*, 224 F. 2d 146.

In *People v. Grzeszczak*, 77 Misc. 202, 206 and 208, the Court had before it the question whether the People were collaterally estopped from relitigating an issue of identity following an acquittal of a different crime. Double Jeopardy was held not available as a defense but the Court held that collateral estoppel was available and the defendant's former acquittal was a bar to the maintenance of the second prosecution.

In summary, collateral estoppel may be a bar to the bringing of the second prosecution or merely an estoppel to the relitigation of particular facts or mixed issues of fact and law previously determined. *Sealfon* v. *U. S.*, 332 U. S. 575.

"This was second attempt to prove the agreement which at each trial was crucial to the prosecution's case and

which was necessarily adjudicated in the former trial to be nonexistent.

"The Court held that the core of the prosecutor's case was based upon the corrupt agreement which was necessary adjudicated in the former trial to be non-existent".

Res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined, though the offenses be different. *U. S.* v. *Oppenheimer*, 252 U. S. 85.

"The core in each case was the same".

How many times may a defendant be put on trial and face the same witnesses on the same issue.

Here the petitioner was twice put on trial before a Jury and first was acquitted in the State Court, and then convicted in the Federal Court on the same issue.

Is there no end.* May he be tried again and again.—

2. It is the contention of the petitioner herein that there was absolutely no evidence in the record from which a finding could be made that there existed a conspiracy to violate the laws of the United States.

There was no testimony by any witness to such effect.

The gist of the crime is the convention or combination of minds. "A conspiracy is constituted by an agreement; it is however, the result of the agreement, and not the agreement itself. The formal agreement between the parties is essential to the formation of the conspiracy, for the agreement may be shown if there be concert of action, all the parties working together understandingly, with a single

* Subsequent to the conviction in the Federal Court the petitioner was again placed on trial in the Queens County Court on the same issues and facing the same witnesses, and this time he was acquitted. Thus making the score two acquittals to one conviction.

design for the accomplishment of a common purpose." *Fowler* v. *U. S.*, 273 F. 15.

A conspiracy to cause stolen cars to be transported in interstate commerce does not exist unless it is understood to be a part of the project that the cars shall cross state lines.

It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. *U. S.* v. *Crimmins*, 123 F. 2d 271; *Gable* v. *U. S.*, 84 F. 2d 929; *Linde* v. *U. S.*, 13 F. 2d 59; *Davidson* v. *U. S.*, 61 F. 2d 250.

In the case at bar, the cars mentioned in Counts Six thru Sixteen were sold to one Steinbrecher, a reputable wholesale second hand dealer of automobiles with a place of business on Jerome Avenue in the Bronx, and were immediately on purchase by him, put on his lot for resale to any other wholesaler who came upon the lot and wanted to purchase said cars. At the time Steinbrecher purchased the cars, he did not know who the purchaser would be or where the cars would ultimately go to, and the cars were resold by him in New York.

It is respectfully submitted that these cars came to rest in New York, and were not a part of an interstate transportation.

In Counts Three, Four and Five, the cars were sold to Mindy Motors, a Bronx second hand dealer in automobiles who in turn sold the cars to whatever customers they had and then transported by them to their customer.

It is contended respectfully that title to these cars passed in New York, whether paid for in cash or on credit.

It is respectfully submitted that these cars came to rest in New York, and were not a part of an interstate transportation.

In Counts One and Two, there is no testimony in the record that appellant told anyone to take the cars involved to Connecticut. It was not until after cars had been brought to Connecticut that appellant heard that they were in Connecticut. These cars are also part of Mindy Motors transactions as DiNapoli testified he considered LaFazia and Brill working for LaFazia, as representing Mindy Motors. The testimony is that these two counts, One and Two, refer to the last transactions in this case.

None of the witnesses who were produced by the Government to establish the conspiracy, namely, Phillippe Roy and Jose Monteiro, testified that it was a part of the plan and scheme to transport cars across state lines.

If the Government now contends that they want to enlarge the scope of the conspiracy by asking that the conspiracy be inferred from the acts of the conspirators, then it is respectfully submitted that the fact that three cars out of seventeen are taken across state lines is not a basis for such an inference that the scheme or plan or conspiracy was to transport stolen cars across state lines when fourteen of the cars involved were sold in the State of New York, and the cars involved in Counts One and Two that went to Connecticut were sold in New York and negotiated and resold over telephone in New York to a buyer in Connecticut.

Knowledge that the cars were being moved in interstate commerce is a necessary element of conspiracy count.

A conspiracy to cause automobiles to be transported in interstate commerce does not exist unless it is understood to be part of the project that the cars shall cross state lines. *United States* v. *Crimmins*, 123 F. 2d 271.

3. It is the contention of the petitioner herein that the record is bare of any testimony that the petitioner transported or caused to be transported in interstate commerce

motor vehicles knowing the same to have been stolen as alleged in Counts One thru Sixteen.

That Title 18, U. S. C., Sec. 2312 relates to the transportation of motor vehicles in interstate commerce knowing the same to have been stolen, is a criminal statute and as such all of the elements thereof must be proved to the satisfaction of a jury beyond a reasonable doubt.

In order to sustain a conviction under Title 18, U. S. C., Sec. 2312, the Government must prove that the defendant transported or caused to be transported a motor vehicle in interstate commerce and that defendant knew the motor vehicle to have been stolen at the time he transported or caused the transportation. *Evans* v. *U. S.*, 240 Fed. (2) 695.

That in a prosecution under Title 18, U. S. C., Sec. 2312, the burden of proof is upon the Government to prove that at the time defendant received the automobile he had knowledge that it was stolen and in addition, that he (the defendant) either moved or caused the same to be moved in interstate commerce, or, across state lines. *Seefeldt* v. *U. S.*, 183 Fed. (2) 713.

That in order to secure a conviction under Title 18, U. S. C., Sec. 2312, the prosecution must establish beyond a reasonable doubt that defendant

A. transported or caused to be transported a motor vehicle in interstate commerce;

B. that said motor vehicle was, in fact, a stolen car, and

C. that defendant knew said motor vehicle to have been stolen at the time of said transportation. *United States* v. *Leggett*, 269 F. 2d 35, 1959, 7th Cir.; *Spalitto* v. *United States*, 39 F. 2d 782.

4. It is the contention of the petitioner that the Court below erred in instructing the jury that under the substan-

tive crimes of transporting it was not necessary to prove knowledge, and that foreseeability was sufficient, whereas under the conspiracy count, it was necessary to prove knowledge, which is more than foreseeability.

I respectfully submit, therefore, that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the conviction of petitioner.

Respectfully submitted,

HERBERT S. SIEGAL,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 242—October Term, 1962

(Argued March 5, 1963 Decided March 27, 1963)

DOCKET NO. 27537

UNITED STATES OF AMERICA,

Appellee,

v.

HAROLD WAPNICK, JAMES LAFAZIA, CHARLES GERSH, and DAVID BRILL,

Defendants-Appellants.

Before:

CLARK and WATERMAN, *Circuit Judges,* and ANDERSON, *District Judge.*

Appeal from the United States District Court for the Eastern District of New York, John R. Bartels, Judge.

Harold Wapnick, James LaFazia, Charles Gersh, and David Brill appeal from judgments of conviction, upon a jury verdict, on an indictment charging transportation in interstate commerce of stolen motor vehicles, in violation of 18 U. S. C. § 2312, and conspiracy to violate that section, 18 U. S. C. § 371. Affirmed.

HERBERT S. SIEGAL, Bronx, N. Y., *for defendant-appellant Harold Wapnick.*

JOSEPH BRILL, New York City, *for defendant-appellant James LaFazia.*

JACOB W. FRIEDMAN, New York City, *for defendants-appellants Charles Gersh and David Brill.*

JEROME C. DITORE, Asst. U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Joseph P. Hoey, U. S. Atty., Brooklyn, N. Y., on the brief), *for appellee.*

PER CURIAM:

The evidence here was quite sufficient and the case was fairly tried and properly presented to the jury. Hence we find no reversible error. Defendant Wapnick's contention of double jeopardy is *prima facie* untenable in the light of *United States* v. *Lanza*, 260 U. S. 377, and *Abbate* v. *United States*, 359 U. S. 187.

Affirmed.